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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM CASTILLO, Defendant and Appellant.	G041331 (Super. Ct. No. RIF123976) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, W. Charles Morgan, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant William Castillo was convicted of first degree murder (Pen. Code, §§ 187, subd. (a)), 189) and the jury found true he personally discharged a firearm causing death (Pen. Code, § 12022.53, subd. (d)). Defendant was sentenced to 25 years to life for the murder and a consecutive 25 years to life for the enhancement. He argues the court improperly excluded evidence of the victim's gang membership, commented on evidence without a curing instruction, and failed to give a sua sponte jury instruction. We agree the evidence was improperly excluded but conclude exclusion was harmless and find no merit in defendant's other arguments. Consequently, we affirm.

FACTS

One afternoon defendant went to visit his sister and her boyfriend, Fidel Rolon. While he was there he removed from his pants pocket a semiautomatic gun that he had shown to Rolon a few months earlier. Rolon agreed to give defendant a ride home. Before defendant got into Rolon's white Mustang, he put the gun back into his pocket.

During the drive Rolon saw 15-year-old Enrique Steven Cerda standing on a street corner; Cerda was waiting to be picked up by Richard Gallegos. As Rolon drove through an intersection defendant told him to turn around because Cerda looked familiar, like someone who owed him money. Rolon described defendant as anxious, "pumped," and "aggressive." When Rolon stopped the car, defendant got out and began walking toward Cerda, who had his back to defendant. Rolon saw defendant lift the gun and shoot Cerda. Defendant put the gun back in his waistband and ran to Rolon's car and got in. As Rolon drove away defendant said, "Fuck. Fuck." "I shot him. I shot him. What did I just do?" Cerda died later that night.

When they arrived at defendant's house Rolon asked him what was going to happen, to which defendant replied, "Don't worry. . . . Just try not to bring the car

around as much." "Don't say anything, nothing will happen." When Rolon left defendant still had the gun on his person.

About a month later police stopped Rolon's white Mustang driven by defendant's sister. Rolon subsequently gave a statement to police denying any knowledge of the shooting, but later he admitted his own participation. He entered into an agreement for a 12-year sentence for voluntary manslaughter in exchange for truthful testimony. While defendant and Rolon were in custody, defendant told Rolon if he had just been quiet nothing would have happened. He also told him to change his version of the events, claiming he had "paperwork" about Rolon's statements to the police. Rolon interpreted this as a threat defendant would reveal the agreement to other inmates who would harm Rolon.

Defendant testified in his own defense. He stated on the day of the shooting Rolon drove him to the DMV so defendant could take a driving test. As Rolon was driving defendant home, they saw Cerda, whom defendant knew from school. On seeing defendant in the car, Cerda motioned him to stop. Defendant thought Cerda might need a ride and as the car passed him, defendant asked Rolon to turn the car around and go back toward Cerda. He told Rolon he would be back once he checked with Cerda.

Defendant claimed that when he asked Cerda if he needed a ride, Cerda inquired why defendant had not "back[ed him] up" in an incident occurring a few months before when five or six guys were beating Cerda. When defendant apologized, explaining he had not wanted to get involved, Cerda called him a "scary bitch." Defendant, who saw that Cerda was angry and feared a fight was in the works, noticed Cerda reaching for something in his waistband that he thought was a gun. Fearing for his life, defendant grabbed the gun and tried to pull it away from Cerda, at which point the gun discharged once. Defendant never intended to shoot or kill Cerda.

When defendant got back into the car with Cerda's gun, he asked Rolon to drive him home; he did not tell him he had shot Cerda. Once they got to defendant's

house, defendant told Rolon Cerda had tried to pull a gun on him and "[i]t popped. I think he's hit." Defendant left Cerda's gun in Rolon's car after Rolon said he would dispose of it. Defendant denied ever previously showing a gun to Rolon.

In a police interview with Cerda's parents they said Cerda had been "jumped" by several people about a year before the shooting. The parties stipulated that about a week before the shooting Cerda had shown two acquaintances a loaded small semiautomatic chrome handgun.

On rebuttal the prosecution introduced a tape of a police interview of defendant where he repeatedly insisted he had not shot Cerda or anyone else, had not been at the scene, and had been wrongfully identified by people who did not like him and were lying. He told them that on the day of the shooting he had been home all day and denied being with Rolon. Originally he said he did not know Cerda and then said he had gone to school with him a month or two before the shooting.

DISCUSSION

1. Evidence of Cerda's Gang Membership

a. Defendant's Evidence

Defendant moved in limine to be allowed to introduce evidence of Cerda's gang membership based on his defense of self-defense. Counsel argued defendant would testify he knew of Cerda's membership in a gang subject to a district attorney restraining order and of Cerda's history of violence and carrying weapons. Based on this knowledge, when defendant saw Cerda on the street he was "absolutely afraid" of him. The court commented that defendant's argument was substantially diminished because defendant approached Cerda, not the other way around. Counsel replied that defendant had Rolon stop the car because Cerda had waved him over and defendant did not want to disrespect him.

The prosecution argued defendant was trying to "malign" Cerda and make it seem like he was violent. Further, it argued, there was no evidence he had yelled a gang name or had a gun at the time. The defendant countered that the only witness who said defendant had a gun was Rolon, who admitted at the preliminary hearing that he had lied repeatedly to the police whereas there were two witnesses who saw Cerda with a gun a week before the shooting and that he had used it "in a violent manner," i.e., a drive-by shooting, the same day he had been released from custody. The defense theory was that Cerda had the gun and it went off during the confrontation with defendant.

The court denied the motion, stating that the public, including the jurors, knew very well about gangs and the problems they cause and have "a natural fear" of them. Its rule was that it did not allow evidence of gang membership unless it was unavoidable and "crucial to the evidence being presented." This was not such a case because there was a chance meeting between Cerda and defendant and defendant could have avoided it by not stopping.

b. Exclusion of Evidence

Defendant contends that evidence of Cerda's gang membership was improperly excluded. He cites the offer of proof of his knowledge Cerda's gang had a reputation for committing violent crimes and he was afraid of Cerda and thought his life was in danger.

Where charged with murder, when a defendant relies on self-defense, evidence of the victim's character or reputation for violence is admissible if offered "to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a)(1); *People v. Wright* (1985) 39 Cal.3d 576, 587.) When defendant knows the character of the victim, the evidence is relevant to show the nature and degree of defendant's fear. "The law recognizes the well established fact in human experience that the known reputation of an assailant as to violence, even if specific acts

are not within the knowledge of a persona assaulted, has a material bearing on the degree and nature of apprehension of danger on the part of the person assaulted (and further even if the reputation is unknown) to show that one who is turbulent and violent may more readily provoke or assume the aggressive in an encounter. [Citations.]" (*People v. Smith* (1967) 249 Cal.App.2d 395, 404.)

As the Attorney General notes, such character evidence is not always admissible; it must be considered on a case by case basis in light of, among other things, whether its admission is relevant and more prejudicial than probative under Evidence Code section 352. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) Our case is close but such an analysis convinces us the evidence should have been admitted.

Defendant wanted to testify that when he saw Cerda on the street he was afraid of him because he knew he was a member of a violent gang. This could have given weight to his testimony that Cerda, not he, had the gun and that Cerda was the aggressor who possessed and initially reached for the gun.

Moreover Evidence Code section 352 did not mandate exclusion of the evidence. The proposed testimony was brief, resulting in no "undue consumption of time." (*Ibid*.) And the jury's "natural fear" of gangs, on which the trial court based its decision, did not outweigh defendant's right to put on his defense. Rather, "'[e]vidence that [defendant] might have had reason to fear for his life would not have "confused the issue." It would have further illuminated the situation the jury was required to evaluate.'" (*People v. Minifie*, *supra*, 13 Cal.4th at p. 1071.)

Nevertheless exclusion of the evidence was harmless. Defendant had the opportunity to put on a defense, i.e., Cerda had been seen with a gun the week before defendant shot him, Cerda had the gun in this encounter, defendant was afraid when he saw it, and when he reached for it the gun accidentally discharged. Further, defendant was not prevented from putting on evidence he was afraid when he saw Cerda on the

street, only the reason for his fear, Cerda's gang membership. That defendant did not testify to this fear was his choice.

In addition, there was substantial evidence supporting defendant's conviction. One witness, Frederick Diego who was driving home, saw Cerda walking down the street "minding his business." As he went into his driveway Diego saw the white car. Upon entering his apartment Diego heard a gunshot, walked outside, and saw a man put a black gun into his waistband and run to the car. He did not hear any sounds of a scuffle, including voices, before the shot. On the tape of his call to 911, played to the jury, Diego said the shooting seemed to be planned because a car waited for the shooter at the corner. After the shooting the shooter ran toward it and the car drove away.

Another nearby resident testified she heard a shot but had not heard any talking before. She also saw a man get into a small white car and saw it drive away.

Rolon testified defendant shot Cerda from three to five feet away. He heard no argument, Cerda was not aggressive nor did he have a gun. After the shooting defendant did not tell Rolon anything consistent with defendant's version of the events testified to at trial. And defendant points to nothing in the record explaining why Rolon's incriminating testimony was anything other than truthful.

Further, contrary to defendant's testimony, the autopsy revealed no signs Cerda had been in a fight. The lack of stippling, soot, or a muzzle mark on his body showed the gun had been over 18 inches away from Cerda's body when fired. Finally, defendant's testimony contradicted his statement to the police. Nor was it consistent with any other testimony or the physical evidence.

In light of this, it is not reasonably probable that admission of the excluded testimony would have resulted in a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Comment on Evidence

Dr. Mark McCormick, the forensic pathologist who autopsied Cerda, testified that his body contained no stippling, muzzle stamp, or soot, indicators the victim was shot from close or intermediate range, i.e., within 18 inches. On cross-examination, counsel asked questions seeking to show that the lack of these indicators did not preclude defendant's version of the events, that Cerda pulled the gun from his pants, defendant grabbed it, and in the struggle for it, defendant shot Cerda.

On redirect, in response to the question whether a person struggling with a gun would get stippling on his hands, McCormick stated it was possible, depending on the position of the hands on the gun. When the prosecutor asked if there would be soot or a muzzle stamp, he said there would probably be "gunshot residue." The court then stated, "No, I'm not going to – no. This is so farfetched from what we're – [¶] . . . [¶] Struggle over a gun that could consist of a hundred different permutations that we do no know about."

At the end of McCormick's testimony, defense counsel asked the court to instruct the jury not to consider any of the judge's comments about the evidence, referring to its statement quoted above. He referred to his theory of the case explained in opening statement that Cerda and defendant struggled over the gun. The court refused stating that certain of counsel's questions on the topic had been "well off the beam and [it] didn't intervene there." When defense counsel repeated that "'so farfetched' [was] a comment on the quality or nature of the theory," the court repeated that it was "so farfetched" because "[t]here could be at least 100 permutations."

Defendant argues this comment on the evidence was improper because it was not necessary for a determination of the case and was inaccurate, unfair, argumentative, and disparaging of defendant's theory. He contends the statement implied the defense was "arbitrarily pulled from a hat full of available possibilities . . . play[ing] into the prosecutor's final argument that [defendant] had very recently concocted a

ridiculous story . . . ." Failing to give the curative admonition caused was even more prejudicial.

The court has discretion to control the trial, including admission of only relevant evidence to expedite the trial. (Pen. Code, § 1044 [judge's duty "to limit the introduction of evidence and [counsel's] argument"]; Evid. Code, § 765, subd. (a) [court to control "mode of interrogation"] In *People v. Harris* (2005) 37 Cal.4th 310, the defendant claimed the judge was biased based, in part, on what he characterized as "direct statements of disbelief of defendant's case . . . ." (*Id*. at p. 346.) When defendant's lawyer was cross-examining an evidence technician about the possibility of fingerprints on a magazine inside a gun, the court interrupted, commenting that the questions were a "waste of time." (*Id*. at p. 348.) Later in the questioning the court called another question "meaningless." (*Ibid*.) *Harris* held these statements were a proper exercise of discretion to expedite questioning. (*Ibid*.)

In our case, too, the court did not improperly comment on the evidence. It merely limited questions asking the witness to speculate on possibilities of a struggle with the gun. It did not denigrate defendant's evidence; "farfetched" was not applied to defendant's theory of the case. Further, the court allowed defense counsel to ask all his questions on this topic. Only when the prosecutor began redirect did it stop the examination of the expert, which redounds to the benefit of defendant. (*People v. Hamilton* (2009) 45 Cal.4th 863, 921 [trial court has discretion to limit extent of redirect].)

Finally, the jury was instructed with CALCRIM No. 3550, which advised that it should "not take anything [the judge] said or did during the trial as an indication of what [he] think[s] about the facts, the witnesses, or what your verdicts should be." We presume the jury followed the instruction. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

3. Jury Instruction on Penal Code Section 1097

Penal Code section 1097 provides: "When it appears that the defendant has committed a public offense . . . and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only." In *People v. Dewberry* (1959) 51 Cal.2d 548 the court held that where "the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. [Citations.]" (*Id*. at p. 555.) Defendant contends the court erred because it did not give such an instruction sua sponte. We are not persuaded.

The jury was instructed with CALCRIM No. 521, as follows: "If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] The defendant is guilty of first degree murder if the People have proved [the listed elements of first degree murder]. [¶] . . . [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." The court also gave CALCRIM Nos. 220 dealing with reasonable doubt, which instructed that the People's burden of proof was beyond a reasonable doubt, and 224 applying that burden to circumstantial evidence. Additionally the jury was instructed with CALCRIM No. 200 requiring that all instructions be considered together.

The combination of these instructions fulfilled the requirement that the jury be instructed that if it found defendant had committed murder but the prosecution did not prove first degree murder beyond a reasonable doubt, it could only convict defendant of second degree murder.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.